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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PETER DEFAZIO, ET AL, PETITIONERS,

V.

THE CITY OF SPRINGFIELD BY AND
THROUGH THE SPRINGFIELD UTILITY BOARD, ET AL.

SUPPLEMENTAL APPENDICES

TO

WRIT OF CERTIORARI

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CITY OF SPRINGFIELD

V.

WASH. PUBLIC POWER SUPPLY

Cite as 752 F.2d 1423 (1985)

Before KENNEDY and FERGUSON, Circuit Judges, and WILLIAMS, * District Judge.

FERGUSON, Circuit Judge:

This case involves a challenge to the validity of several contracts to construct and distribute power from nuclear power plants among (1) a number of Oregon, Washington and Idaho cities and public utility districts (the participants). (2) the Washington Public Power Supply System (Supply System or WPPSS), and (3) the Bonneville Power Administration (BPA). The district court rejected the argument that the participants lacked authority under local state law to enter into such agreements and upheld them under federal common law. We affirm, but with certain modifications.

FACTS

Congress established the BPA to serve as the federal marketing agency for

electric power produced in the Pacific Northwest. 16 U.S.C. § 832 et seq. The BPA acquires hydroelectric and other power and distributes it to utility companies and other customers. WPPSS is a municipal corporation and joint operating agency under Washington law. Wash.Rev.Code § 43.52. It is an association of nineteen Washington public utility districts and four Washington cities, formed to finance, construct, own and operate electrical generating facilities.

In the early 1970s, the BPA entered into a series of three party contracts with various public utilities and WPPSS to build and distribute electricity from four nuclear power plants. These plants were designated the Trojan Nuclear Project and WPPSS Nuclear Projects 1, No. 2 and No. 3. The agreement relating to each project is an identical three-party contract consisting of a "Project Agreement" and a "Net Billing Agreement." The "Project Agreement" provides "for financing, construction, ownership and operation"

of the plant and is executed by WPPSS and the BPA. The "Net Billing Agreement" provides for the distribution of electricity to the participants through BPA. A declared purpose of the net billing agreement is to "pool electric power and energy acquired hereunder with other power available to the (BPA) Administrator from the Federal Columbia River Power System so that any costs or losses associated with acquiring such power and energy will be borne by the (BPA) Administrator's ratepayers through rate adjustments if necessary." By such pooling, the effect of an unexpectedly great cost can be diluted by the use of cheaper and readily available energy from other sources.

The participants under the net billing agreements agreed to use a share or percentage of the electricity generated by the plant. The cost of that share is computed by milti-plying the participant's share by the amount of the annual budget (less funds payable from

other sources). This cost is reflected in the "Billing Statement" prepared by WPPSS and must be paid by the participant "whether or not the Project is completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the Project output."

The participants do not receive their share of the power produced by the plant directly, however. They "assign" the power to the BPA, which pools it with its other sources of power. The BPA then provides the participant with the amount of electrical power they need, and deducts the amount the participants paid directly to WPPSS from the cost of the power delivered by BPA. Should the amount the participant paid to WPPSS exceed the cost of electricity actually delivered by BPA, the accumulated balance in favor of the participant "shall be paid in cash" to the participant by BPA, "subject to the availability of appropriations for such purposes."[1] The BPA Administrator

is also authorized to "use his best efforts" to assign a participant's excess share to another BPA customer.

In 1976, WPPSS entered into two-party contracts with certain Northwest cities and utilities to construct and sell power from two additional nuclear power plants--Projects 4 and 5. Those two-party contracts do not involve the BPA. They [the Projects' 4 and 5 two-party contracts] require the cities and utilities to pay their percentage of the costs specified in the contracts, and to receive their percentage of the power directly from WPPSS, even if the amount of power received is zero. Construction of Projects 4 and 5 was abandoned in 1982, and the local entities became obligated under the contracts to pay their percentage of the costs even though they were receiving no power and no power could be produced. The supreme courts of Washington and Idaho subsequently held that these two-party contracts could not be enforced against the

local utilities and cities as the contracts were not properly executed or exceeded the authority of the cities or utilities. Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983); Chemical Bank v. WPPSS, 99 Wash.2d 772, 666 P.2d 329 (1983). The Oregon Supreme Court issued an opinion on March 20, 1984 holding that Oregon local utilities acted within their authority in executing the two-party agreements with WPPSS, DeFazio v. WPPSS, 296 Or. 550, 679 P.2d 1316 (1984).

This case was brough by the City of Springfield, Oregon, and sought a declaratory judgment that it either had "full legal authority to enter into the (three-party) Net Billing Agreements on Projects 1, 2, 3 and Trojan by reason of Bonneville's obligations thereunder," or that, if it did not have authority to enter into the agreements, "Bonneville is liable to Supply System to make such payment and estopped to claim its lack of obligation to do so." The complaint was brought after the decision

of an Oregon trial court which, in agreement with the courts of Washington and Idaho, held the two-party contracts for Projects 4 and 5 unenforceable. The Oregon Supreme Court has since reversed that court, DeFazio v. WPPSS, supra.

The City of Springfield joined as defendants all local participants in the net billing agreements, WPPSS and BPA. Springfield ratepayers, represented by Peter DeFazio, intervened, arguing that the case did not present "a genuine justiciable controversy" until the appeal of the Oregon trial court decision was decided and, in the alternative, that the city lacked authority to enter into the net billing agreements.

On a motion for summary judgment decided before the Oregon trial court was reversed, the district court upheld the validity of the net billing agreements and the authority of the local participants to execute them. City of Springfield v. WPPSS, 564 F.Supp. 90 (D.Or.1983). The Court states that "because BPA, a federal agency, has assumed the 'dry-

hole' liability as to WPPSS plants 1, 2 and 3 the net billing agreements are contracts with the federal government whose interpretation is a matter of federal, not state concern." Id. at 93-94. The court then concluded: "The utilities entering into these agreements thus merely entered into authorized contracts for power. If no power is provided, no power is paid for. There is no infirmity in this arrangement." Id. at 95.

ISSUES

1. Is there a justiciable controversy involving all partes?

2. Was the case decided on an adequate record or did thecourt err in denying discovery?

3. Did the district court correctly conclude that "federal common law" controlled?

4. Under the applicable law, did the signatories to the net billing agreements act within their legal authority?

DISCUSSION

1. Was There a Justiciable Controversy

Involving All Parties?

(1) In its complaint, the City of Springfield joined all signatories to the net billing agreements because those parties might be affected by a declaration that the City of Springfield lacked authority to enter the agreement. The agreements provided that each participant's share would automatically be increased prorata up to a specified maximum in the event any other participant failed to perform. The BPA cross-claimed against all signatories, alleging that all parties had the requisite authority to execute and perform those agreements. Several appellant public utility districts admitted that they had such authority and moved to be dismissed. They argue that there is no justiciable controversy and the district court's declaratory judgment was an advisory opinion as to them.

First, we find that there is an actual controversy as to the City of Springfield's authority to enter the agreement by virtue of

the position asserted by the intervenors challenging that authority. While it appears to us that there was a case or controversy at the outset, the alternate position of the intervenor that the cities lacked authority to enter into the net billing agreements resolves any doubt on that point. See INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); Associated General Contractors of America v. Laborers Internationsl Union, 476 F.2d 1388, 1402-03 (Tem.Emer.Ct.App. 1973). In addition, the parties have taken different positions on the issue of the validity of the agreements, on whether the agreements are governed by federal or by state law, and on whether abstention is appropriate.

Moreover, all parties would be affected by the invalidity of the agreement of any other partey; a massive reshuffling of rights and obligations would result from invalidation of any of the agreements. This factor makes the joinder of all signatories desirable even

if not indispensable, and the court could properly issue a judgment binding on all. See, e.g., Fed.R.Viv.P. 20.

2. Was the Case Decided On An Adequate Record? Did the Court Err in Denying Discovery?

DeFazio raises two related arguments: first, that the case was not properly decided because of the lack of a fully developed adversarial record; and, second, that the trial court erred by denying discovery.

(2,3) DeFazio did not identify any questions of fact that would have prevented summary judgment. He questioned the participants' authority under state law. The district court correctly ruled that the dry-hole risk rested with the BPA. As a result, there are no factual issues which need to be resolved. A request for discovery may be denied when it is not relevant to the issues presented on a motion for summary judgment. St. Louis Union Trust Co. v. United States, 617 F.2d 1293, 1299-1300 (8th Cir. 1980).

3. Did the District Court Correctly Conclude That "Federal Common Law" Controlled?

As some of the parties have pointed out, there are two separate issues in this case The first issue is one of contract construction Do the net billing agreements place the dry-hole risk on the BPA or on the participants? The interpretation of a contract is ordinarily made by reference to the terms of the contract itself. See Ayres v. Prudential Insurance Co., 602 F.2d 1309, 1312 (9th Cir. 1979). "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning. Restatement (Second) of Contracts § 201(1) 1981). "[T]he primary search is for a common meaning of the parties, not a meaning imposed on them by the law." Id. comment c.

(4) In this case the district court, in accordance with the intent of the parties to the net billing agreements, held that the contract placed the dry-hole risk on the BPA.

It found that the participants will receive a credit from the BPA equal to its payment to WPPSS or receive a cash refund. A review of the agreements without reference to either state or federal law confirms the reasonableness of this interpretation. As the agreement are the same for all signatories, irrespective of their state of origin, the same interpretation should apply. There is no reason to fear that inconsistent interpretations of the agree ment will result from various state laws as th agreement itself is clear and requires no implied-in-law guidelines to interpretation.

(5) The second issue presented is whether the various local participants acted within their legal authority inexecuting the net billing agreements. The district court apparently applied "federal common law" to thi issue. As in United States v. Little Lake Misere Land Co., 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973), there is no specific federal legislation mandating that state or

particular federal law control the BPA net billing agreements. See id. at 593, 93 S.Ct at 2397. Thus federal courts must "fashion the governing rule of law according to their own standards." Id. at 594, 93 S.Ct at 2397-2398 (quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67, 63 S.Ct 573, 574-75, 87 L.Ed. 838 (1943)). Relevant state law must be identified in order to determine whether it should be borrowed or it it would be "aberrant or hostile" to the federal program involved. Little Lake Misere, 412 U.S. at 596, 93 S.Ct. at 2398; United States v. Med O Farm, Inc., 701 F.2d 88, 90 (9th Cir. 1983); United States v. California, 655 F.2d 914, 917 (9th Cir. 1980). Choice of law "depends ultimately and exclusively on the nature of the issue involved and the significance of the specific federal interests in the resolution of the (dispute)." 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 4514 at 274 (1982).

(6) In this case the City of Springfield sought a declaration that it either did or did not act within its legal authority in entering into the three-party net billing agreements. The Oregon trial court (reversed on appeal), the Washington Supreme Court in Chemical Bank v. WPPSS, 99 Wash.2d 772, 666 P.2d 329 (1983) and the Idaho Supreme Court in Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), had held that their local utilities and cities were not authorized to enter into the two-party contracts for WPPSS Projects 4 and 5 (which did not include the net billing arrangement with BPA) due to state constitutional or statutory debt limitations. In order to determine whether the City of Springfield acted within its authority, or had the "capacity" to enter the contract, the limits of the city's authority must be ascertained. The state's interest in ascertaining and applying state law in this area is great as a local government's authority goes directly to "the State's freedom to structure

integral operations in areas of traditional governmental functions." National League of Cities v. Usery, 426 U.S. 833, 852, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976). See Bambu Sales, Inc. v. Gibson, 474 F.Supp. 1297, 1301 (D.J.J. 1979).

(7) The federal interest, which must be balanced against the state interest, United States v. California, 655 F.2d at 917, is two-fold. First, the federal government has an interest in enforcing its contracts. However, the Supreme Court in United States v. Yazell, 382 U.S. 341, 86 S.Ct 500, 16 L.Ed.2d 404 (1966), rejected the government's argument that there is an "overriding federal interest" in the "unlimited right of the Federal Government to choose the persons with whom it will contract." Id. at 349 & n. 19, 86 S.Ct. at 505 & n. 19. The enforcement of the contracts alone is not a strong enough federal interest to overcome the essential state interest in defining the scope of local governmental authority. The other federal interest recognized

by the district court is one of uniformity. 564 F.Supp. at 94. However, in Yazell, the Court found no problem in applying the different laws of the states to local matters, such as the capacity to contract, particularly when the contract at issue is adapted "specifically and in great detail" to the state law. 382 U.S. at 357, 86 S.Ct. at 509.

In this case the net billing agreement were developed for use in the Pacific Northwest Given the regional nature of the BPA and its intimate involvement in the local distribution of electricity, it would seem that whatever contracts it makes with local governments should be made with reference to the relevant local laws. Once the terms and obligations of the agreements themselves are uniformily interpreted, the authority of the various local governmental units to enter into them is a matter of local law.

4. Under Applicable Law, Did the Participants Act Within Their Legal Authority?

(8) The net billing agreements are sufficiently different from the two-party contracts for WPPSS Projects 4 and 5 to require a separate analysis. DeFazio v. WPPSS 679 P.2d at 1321-22; Asson v. City of Burley, 670 P.2d at 841-42; Chemical Bank v. WPPSS, 666 P.2d at 332-33. Before undertaking that analysis, it is worthwhile to note several key differences in the three-party net billing agreements. They are: (1) although the participants are obligated to pay WPPSS regardless of whether they receive power from the plants, they receive either credit for those payments for power actually supplied by BPA or a refund from BPA; (2) there are provisions for shifting the debt to other BPA users in the event a participant no longer needs the power from WPPSS; (3) electric rates are not directly tied to a particular plant's expenses as BPA pools electrical power from various sources to determine rates; and (4) the dry-hold risk is not borne exclusively or primarily by the local

participants. (It may be borne by them indirectly if BPA raises its rates to cover its liability. On the other hand, BPA may receive appropriations to cover some costs associated with the expense of nuclear power.)

Because the net billing agreements place the dry-hole rist on the BPA, and not on the local participants, and because the local participants will receive either electricity or a cash refund equal to their payments to WPPSS, the district court was correct in finding that this arrangement is in fact a contract for the purchase of electricity. None of the participants have argued that they lack authority to enter into such contracts, indeed, the raison d'etre of the utilities, at least, is to provide electricity. The parties have conceded that they are authorized under local law to enter into contracts to purchase electricity.

CONCLUSION

The local participants did not exceed their authority by entering into the net bill-

ing agreements with BPA and WPPSS. Although the district court erred in declaring the participants' authority to be defined by an amorphous federal common law, it reached the right result.

(9) One other aspect of the district court's opinion needs clarification. The district court stated that "the United States bears the financial risk if the plants do not purchase power." 564 F.Supp. at 95. However, it also noted that the United States' liability was "potential," and that it is the BPA which, as a party to the contract, bears the financial risk. 564 F.Supp. at 94 n. 1. The issue of whether it is the BPA or the United States which bears the contractual liability under the agreement is not now before us and we therfore do not address that issue. With that clarification the district court is AFFIRMED.

* Honorable David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

FOOTNOTES

1. In its brief, the Bonneville Power Administration has noted that appropriations for this purpose may be provided pursuant to 16 U.S.C. § 838i(a), (b)(6)(ii).

The CITY OF SPRINGFIELD, a municial corporatio acting By and Through the SPRINGFIELD UTILITY BOARD,

Plaintiff

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation; City of Eugene, Bonneville Power Administration, an agency of the United States Government; Peter Johnson, Administrator of the Bonneville Power Administration, et al,

Defendants.

Civ. No. 82-1387-RE

United States District Court

D. Oregon.

March 15, 1983.

City, through its utility board, brought declaratory judgment action against various federal defendants, utilities, and cities stemming from contracts relating to construction of three nuclear plants and allocation of power from those plants after their completion. On motion by certain defendants to dismiss, the District Court, Redden, J., held that: (1) District Court had jurisdiction over the action; (2) issue

of justiciability was to await litigation of merits of the controversy; (3) Court had personal jurisdiction over out-of-state movants; and (4) venue was proper.

Motions denied.

OPINION

REDDEN, District Judge:

This is a declaratory judgment action brought by the city of Springfield, Oregon, against the Washington Public Power Supply System (WPPSS), the Bonneville Power Administration (B)A), and over a hundred utilities and cities in Oregon, Washington, Wyoming, Idaho, Montana and Nevada. This litigation stems from contracts, commonly known as "net billing agreements," entered into by BPA, WPPSS and the named utilities, including plaintiff. Those contracts relate to construction of three nuclear plants, WPPSS plants 1, 2 and 3, and the allocation of power from those plants after their completion. Plaintiff seeks a declaration that it had

lawful authority to enter into the net billin agreemnts. Plaintiff alleges that uncertaint has arisen on this issue, and that that uncertainty has been increased by the decision in DeFazio v. WPPSS, Lane County Circuit Court No. 16-81-11344[1] which held that certai utilities lacked authority to enter into contracts concerning WPPSS plants 4 and 5. Plaintiff is also a participant in the Trojan nuclear plant in Rainier, Oregon. which has already been completed. Plaintiff argues that there is uncertainty concerning the participation agreement which it signed in order to take part in the Trojan project.

BPA and other federal defendants have filed a cross-claim in this litigation. For purposes of the cross-claim the federal agencies and officers appear as plaintiffs pursuant to 28 U.S.C.§ 1345 and 16 U.S.C. §832k(b). The cross-claim seeks a declaratio that all participants had lawful authority to enter into the net billing agreements.

Certain defendants now move to dismiss under Fed. R. Civ. Pro. 12(b). The movants assert, first, a lack of federal subject matter jurisdiction over this suit. Next, movants assert that there is no justiciable controversy among these parties. Finally, certain out-of-state defendants move to dismiss on the gounds of lack of personal jurisdiction over them, or improper venue.

Federal Statutory Jurisdiction

(1) This suit is properly brought in federal court. Plaintiff seeks to ground jurisdiction in 28 U.S.C. § 1331, by alleging that its action against a federal agency concerning its contracts requires the application of federal common law, which indicates that this action "arises under" federal law. Plaintiff is correct. When federal common law governs an action, the action "arises under" federal law for purposes of 28 U.S.C. § 1331. Illinois v. City of Milwaukee, 406 U.S. 91, 100 92 S. Ct 1385, 1391, 31 L.Ed.2d

712 (1972). Federal common law governs this case, because it is an action against the federal government which could have an impact upon the federal treasury and in which there is an urgent need for the application of a uniform rule. United States v. Seckinger, 397 U.S. 203, 209-210, 90 S.Ct. 880, 884, 25 L.ed.2d 224 (1970); Clearfield Trust Co. v. United States, 318 U.S. 363, 367, 63 S.Ct. 573 575, 87 L.Ed. 838 (1943); see also United States v. Allegheny County, 322 U.S. 174, 183, 64 S.Ct. 908, 913, 88 L.Ed. 1209 (1944); Ghent v. Lynn, 392 F. Supp. 879, 881 882 (D. Conn. 1975); Marcus Garvey Square v. Winston Burnett Const., 595 F.2d 1126, 1132 (9th Cir. 1979) (Dictum).[2]

(2) In addition, I clearly have jurisdiction over the cross-claim of the United States, see 28 U.S.C. § 1345:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction

> of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer therof expressly authorized to sue by Act of Congress.

Thus I have jurisdiction over the cross-claim of the BPA, which seeks declaratory relief similar to that sought by plaintiff. The course of this litigation will not be affected, whether I assert jurisdiction over only the cross-claim or the entire controversy. However, I find that I have jurisdiction over all claims in this controversy.[3] Therefore I will deny the movants' motions to dismiss for lack of federal subject matter jurisdiction.

Justiciability

(3) Movants assert that there is no real controversy in this case, and that plaintiff and the federal defendants merely seek an advisory opinion as to their rights. It is true that the mere styling of this action as one seeking a declaratory judgment does not

indicate that the matter is justiciable; it is "essential to the maintenance of a declaratory relief action that there be an actual controversy in existence." Garcia v. Brownell, 236 F.2d 356, 357 (9th Cir. 1956), cert. denied, 362 U.S. 963, 80 S. Ct. 880, 4 L.Ed. 878 (1960). "Basically, the question in each case is whether * * * there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Lake Carriers Asso. v. MacMullan, 406, U.S. 498, 506, 92 S.Ct. 1749, 1755, 32 L.Ed.2d 257 (1972), quoting Maryland Gas. Co. v. Pacific Coal, 312 U.S. 270, 273, 61 S. Ct 510, 512, 85 L.Ed. 826 (1941). When all parties to an action "desire precisely the same result," it is clear that jurisdiction is lacking. Moore v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 47, 48, 91 S. Ct. 1292, 1293, 28 L.Ed.2d 590 (1971).

In the present case three defendants

originally denied the validity of the net billing agreements. After briefing of jurisdictional issues began and the justiciability problem became clear, all three filed motions to amend their answers to drop claims of the invalidity of the net billing agreements and therby defeat federal jurisdiction.

(4) The motions for leave to amend will be denied. I find that final ruling on the justiciability of this suit is premature. Many of the defendants have avoided a direct answer to the issue in suit, by answering only that plaintiff "contends" the contracts are valid. It is apparent that certain litigants, taking advantage of the court's scheduling of the motions to dismiss prior to the summary judgment motions on the merits, merely seek to avoid adjudication through artful pleading, without conceding their positions on the merits. In addition, many parties have not answered the cross-claims of the federal parties, or have given evasive

answers. I find that a decision on the justiciability of this action must await the litigation of the merits of the controversy, which will have the effect of determining whether the parties are in fact adverse enought to support federal jurisdiction. I certainly have jurisdiction to determine jurisdiction, see United States v. United Mine Workers, 330 U.S. 258, 291-293, 67 S. Ct. 677, 694-695, 91 L.Ed. 884 (1947), and I therfore order that justiciability will be determined after all memoranda on the merits are filed. Only then can it be determined whether all parties "desire precisely the same result," such that there would be nothing left to litigate.

Personal Jurisdiction

Certain out-of-state movants also assert that personal jurisdiction over them is lacking, in that their contacts with Oregon are insufficient to support jurisdiction in this court.

Plaintiff and the federal parties, however, assert that the movants' execution of net billing agreements and other power contracts with BPA, which is of course located in Oregon, subjects the movants to jurisdiction in Oregon courts. In deciding this motion I of course apply the Oregon rules on personal jurisdiction, see Fed.R. Civ. Pro. 4(3); ORCP 4(A)-(L).

(5) I agree with the movants that their execution of one contract with an Oregon entity is not such "substantial and not isolated" activitiy as to subject the movants to suit in Oregon under ORCP 4(A)(4). However, the same is not true with respect to ORCP 4(1), which grants jurisdiction "in any action where prosecution of the action against a defendant in this state is not inconsistent with the constitution of this state or the Constitution of the United States." There is no argument asserted against jurisdiction based upon the Oregon Constitution, and thus the question

before me is whether jurisdiction over these defendants is consistent with federal due process, see Data Disc, Inc. v. Systems Tech. Assn., 557 F2d 1280, 1287 (9th Cir. 1977); Forsythe v. Overmyer, 576 F.2d 779, 782-783 (9th Cir. 1978). cert. denied, 439 U.S. 864, 99 S. Ct. 188, 58 L.Ed.2d 174 (1978). I find that movants are subject to such jurisdiction.

(6) Movants executed contracts[4] with an Oregon entity, BPA, and should reasonably have anticipated being sued in Oregon on those contracts. The present suit arises out of the execution of those contracts. The movants interjected themselves into this forum by receiving the benefits of doing business here. The exercise of such jurisdiction is clearly reasonable. See Data Disc, supra at 1287-1288. I deny the motions to dismisss for lack of personal jurisdiction. Venue is also proper in this district under 28 U.S.C. § 1391(e), which directs that suit against

a federal agency be brought in a district in which the agency is found or defedant resides. BPA and the other federal parties are resident of this district. In addition, the claim "arose" in this district, see Data Disc, supra at 1289-1290, for purposes of 28 U.S.C. §1391(b).

FOOTNOTES

1. DeFazio has been appealed to the Oregon Court of Appeals. A case raising similar issues, Chemical Bank v. WPPSS, et al., No. 82-2-06840-3 (King Co. Wash. Super. Ct. 1982), is now before the Supreme Court of Washington.

2. The United States is liable under the net billing agreements if any party to this action is found not to have had authority to enter into them. The impact upon the federal tresury from this litigation could potentially be immense. This distinguishes the case of Miree v. DeKalb County, 433 U.S. 25, 29, 30, 97 S.Ct. 2490, 2493-2494, 53 L.Ed.2d. 557 (1977), relied upon by movants. Miree was a case in which the federal government had no stake in the outcome; it was simply an action between private litigants. Id. at 29, 30, 97 S.Ct. at 2493, 2494. Thus there was no need for the fashioning of a uniform federal rule. Id. In the present case there is a

crying need for such uniformity. At this writing a court in Washington has upheld the authority of Washington utilities to enter into such contracts, while a court in Oregon has come to a contrary result as to Oregon utilities. If those decisions are upheld on appeal, the federal government will be potentially liable for the shares of the Oregon participants, but not the Washington participants. Such a result would be absurd and would allow the federal treasury's exposure to turn upon state law in a manner inconsistent with the doctrine of Clearfield Trust, supra; see Id., 318 U.S. at 367, 64 S.Ct. at 575. Movants also rely upon Karlin v. Clayton, 506 F.SUpp. 642, 645, 646 (D.Kan 1981), which appears to be confined to the murky area of misrepresenations in armed forces recruiting endeavors. Karlin may not be consistent with the Clearfield Trust doctrine and in any case is confined to its own facts. On the facts of the present case, federal common law applies.

3. In order to remove any doubt on this point, I hold alternatively that I have jurisdiction over the cross-claim under 28 U.S.C. § 1345 and assert pendent jurisdiction over the plaintiff's claim in order to dispose of this controversy in one action, see United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct 1130, 1139, 16 L.Ed.2d 218 (1966). The United States is clearly acting in its capacity as a plaintiff in bringing its cross-claim pursuant to 28 U.S.C. ¶1345, and thus I have jurisdiction over this controversy in any event, see United States v. State of Illinois, 454 F.2d 297, 301 (7th Cir. 1971). It is also clear that retention of jurisdiction solely over the cross-claim, which would have the same effect, would be proper, Pioche Mines Consol. v. Fidelity-Philadelphia, 206 F.2d 336, 337 (9th Cir 1953), but I find adjudication of all aspects of this controversy will serve important ends of judicial economy.

4. Not all movants are parties to the net billing agreements, although all are parties to contracts of some sort with BPA. Whether these contracts are net billing agreements, participation agreements, or ownership agreements is not relevant to my analysis.

The CITY OF SPRINGFIELD, a municial corporation acting By and Through the SPRINGFIELD UTILITY BOARD,

Plaintiff

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation; City of Eugene, Bonneville Power Administration, an agency of the United States Government; Peter Johnson, Administrator of the Bonneville Power Administration, et al,

Defendants.

Civ. No. 82-1387-RE

United States District Court

D. Oregon.

April 27, 1983

City brought action seeking declaration that it had authority to enter into a net-billing agreement with Bonneville Power Administration and power supply system concerning construction of nuclear power plants. The District Court, Redden, J., held that: (1) suite was justiciable; (2) abstention was not required; (3) federal common-law applied; and (4) all signatories had authority to enter

into the agreements.

Declaration issued.

REDDEN, District Judge:

This action concerns three nuclear power plants whose construction was financed under the terms of net billing agreements between the Bonneville Power Administration (BPA), Washington Public Power Supply System (WPPSS), and more than one hundred utilities in Oregon, Washington, Idaho, Montana, Nevada and Wyoming. The plants known as WPPSS plants 4 and 5, have been terminated in mid-construction, and work has ceased on one of these three plants.

WPPSS plants 1, 2 and 3 share a significant characteristic distinguishing them from WPPSS plants 4 and 5: BPA is a signatory to the contracts governing the financing of thier construction. BPA, a federal agency, has assumed the key role in financing the plants through the mechanism of net billing agreements.

In this action, plaintiff City of Springfield, Oregon, seeks a declaration that it had authority to enter into the net billing agreements. The federal defendants, including BPA, seek a further declaration that all participants had authority to enter into the agreements under their respective state laws. The parties now move for summary judgment.

In deciding these motions, I will address several issues. First, I must decide whether this case presents a justiciable controversy. Second, I must decide whether abstention is appropriate and third, I must decide the merits of the motions for summary judgment. These issues interrelate significantly and it is appropriate to summarize the background and history of this litigation.

BACKGROUND TO THIS LITIGATION AND ITS PROCEDURAL HISTORY

BPA was established in 1937 with the

purpose of developing the Northwet's hydro-electri resources and providing low cost energy to the region. In 1966, forecasts of a rapid growth in the power needs of the Northwest caused BPA to urge the construction of nuclear power plants to fill the projected shortfall in the region's energy needs. Between 1970 and 1973 BPA, its customers and WPPSS executed a series of contracts, called net billing agreements, providing for the construction of the nuclear plants. In 1976, WPPSS commenced construction of two more nuclear plants, WPPSS plants 4 and 5. BPA did not participate in those projects, although 88 Northwest utilities did join WPPSS in "participation agreements" for plants 4 and 5.

The predicted sharp growth in Northwest energy demands failed to materialize. As a result, the region faces the prospect of bond payments for the construction of plants which may never generate saleable power. Litigation, however, has certainly been generated, and

pends in several state courts, as well as in this court. Meanwhile, WPPSS faces the prospect of a financial meltdown.

In DeFazio, et al. v. Washington Public Power Supply System, Lane County Circuit Court No. 16-81-11344, ratepayers of the city of Springfield challenged the authority of their city to enter into the participation agreements underlying dormant WPPSS plants 4 and 5. The ratepayers secured a ruling that forbade Oregon public utilities, including Springfield, from paying WPPSS inorder to retire the debt created by plants 4 and 5. The Lane County Circuit Court ruled that, in entering into the participation agreements without a public vote, the Oregon participants had violated provisions of the Oregon Constitution and various statutes forbidding municipalitites from incurring debt without voter approval. DeFazio, now on appeal, sent a shockwave through the Northwest and the municipal bond markets, because it held that

that Oregon utilities were not liable for the indebtedness for WPPSS plants 4 and 5 and raised the possibility that WPPSS would default on the bonds.

Other litigation, filed in this court, sought a ruling to the effect that DeFazio was wrongly decided and has been dismissed on abstention grounds. That suit, Chemical Bank v. City of Bandon, et al., 562 F.Supp. 704 (D.Or. 1983), concerned WPPSS plants 4 and 5, in which BPA owns no interest.

This suit, by contrast, concerns WPPSS plants 1, 2 and 3, in which BPA does have a crucial role. It is argued that BPA has in fact assumed the "dry-hole" risk as to these plants, that is , the obligation of payment if the plants are never completed or never produce saleable power. Thus, it is argued, the utilities which entered into net billing agreements will not be required to retire debts through the use of their taxing power or general revenue, and this, it is further

argued, distinguishes DeFazio. Moreover, the federal involvement in these plants, and the prospect of federal responsibility if the "dry-hole" risk comes to fruition, arguably requires that federal law, not the law of Oregon or any other state, govern these contracts. See Clearfield Trust v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); City of Springfield v. WPPSS, et al., 564 F.Supp. 86, (Opinion on motions to dismiss filed March 15, 1983), at n. 2.

A preliminary issue, however, is whether this case is in fact justiciable, and whether abstention is appropriate in deference to the pending appeal of DeFazio. I address these matters first.

THIS SUIT IS JUSTICIABLE; ABSTENTION IS NOT APPROPRIATE

(1) When this suit was originally filed, some parties moved to dismiss on the grounds that there was no "case or controversy" concerning the net billing agreements, or that the

congroversy was not justiciable because the parties to this suit did not have adverse interests. I reserved decision on this issue until litigation of the summary judgment motions on the merits. City of Springfield, supra (Opinion on motions to dismiss).

Since the time of the original argument of those motions some parties have altered their positions and others have entered this suit. At the present time it is clear that far from being a case in which all parties "desire precisely the same result," see Moore v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 47, 49, 91 S.Ct. 1292, 1293, 28 L.Ed. 2d 590 (1971), this is a case in which unanimity on any issue is lacking. Some parties argue that the net billing agreements are markedly different in effect from the participation agreements invalidated by DeFazio. Other parties take the opposite position, arguing that the net billing agreements are identical, in effect, with the

participation agreements, and therefore the either DeFazio was correctly decided and the net billing agreements are invalid or DeFazio was "aberrational," and Oregon utilities did have authority to enter into both kinds of agreements. While some parties argue that federal law governs this case as a result of the federal involvement, others argue that federal law is inapplicable. Some parties argue that abstention is appropriate, others disagree. I conclude that I am faced with a real and justiciable controversy between litigants having adverse interests and asserting adverse positions.

(2,3) A more difficult issue is the question of abstention. I must start from th axiom that a federal court has the general du to decide a case properly before it, subject only to certain limited exceptions. Knudsen Corp. v. Nevada State Dairy Commission, 676 F.2d 374, 376, 378 (9th Cir. 1982). I conclude that this suit is not appropriate for

absention because it does not requie a ruling on possibly doubtful state law issues, and is governed by federal law, see infra. Nor does this case present issues of Constitutional law which could be avoided by a decision on state law issues, nor is this controversy confined exclusively to a special state administrative or judicial body with special expertise. Nor is a state suit pending which would grant the relief sought by plaintiff. See Knudsen, supra at 377-378; cf. Chemical Bank v. City of Bandon, supra. I therefore decline the invitation to abstain.

THIS CASE IS GOVERNED BY FEDERAL COMMON LAW

(4,5) I find that, because BPA, a federal agency, has assumed the "dry-hold" liability as to WPPSS plants 1, 2, and 3, the net billing agreements are contracts with the federal government whose interpretation is a matter of federal, not state concern. The federal involvement in these projects is certainly extensive. BPA has already "net-

billed" more than $1 billion as part of the program for the construction of these plants. BPA admits it is liable for an additional $6 billion to retire the bonds sold to finance the project. Federal Defendants' Reply Brief at 6. BPA's pursuit of the construction of these palnts has repeatedly been affirmed by Congress. See Public Law 91-439, 91st Cong., H.R. 18127 (October 7, 1970), 84 Stat. 890; H.R. Rep. No. 1219, 91st Cong., 2nd Sess. (1970), at 90; see also 16 U.S.C. § 839a (Supp. V) et seq. (1980), the Pacific Northwest Electric Power Planning and Conservation Act, and see also Central Lincoln People's Utility District v. Johnson, 686, F. 2d 708 (9th Cir. 1982), cert. granted, ___ U.S. ___, 103 S.Ct. 1496, 75 L.Ed.2d 928 (1983). Clearly, there is substantial federal interest in the interpretation of the net billing agreements undertaken by BPA to carry out this program.

This program is necessarily one which

involves utilities throughout BPA's multistate service area. There is a need for a uniform interpretation of the agreements in order to avoid possibly inconsistent interpretations under varying principles of the various state laws of the service area. City of Springfield v. WPPSS, supra at n. 2 and accompanying text; Cf. DeFazio v. WPPSS, et al., supra, with Chemical Bank v. WPPSS, et al., No. 82-2-06840-3 (King Co., Wash. Super. Ct., 1983). I rely chiefly on the doctrine enunciated in Clearfield Trust v. United States, supra at 318 U.S. at 367, 63 S.Ct. at 575, in holding that the interpretation of the contracts should not be subject to varying interpretations under state law.[1]

Certain parties appear to rely on United States v. California, 655 F.2d 914 (9th Cir. 1980), in arguing that there is no need for the application of federal common law. To the extent that United States v. California is applicable, I find that it

supports the application of federal rules of decision. In United States v. California, the federal government sued California for damages caused to national forest land by a fire alleged to have been started through the negligence of state employees. The Ninth Circuit noted that this was essentially a local dispute in which there was no need for a uniform federal rule, and no argument that application of a state rule of decision would frustrate a federal program. Id. 920. The Ninth Circuit found no infirmity in the application of a state statute of limitation, enacted to govern a broad class of cases and not directed solely against the federal government, to bar the suit. Id. at 918-920.

I follow the law as enunciated in United States v. California, balancing federal interests against state interests with the balance weighed in favor of the application of state law, but find that the need for a uniform rule, and the need to avoid frustrating an important federal

program, see Id. at 920, rebut the initial presumption that state law should apply, see Id. at 917. I also rely upon NorthDakota v. United States, ___ U.S. ___, 103 S. Ct. 1095, 75 L.Ed.2d 77 (1983), interpreting United States v. Little Lake Misere Land Co., 412 U. S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973) and Clearfield Trust Co. v. United States, supra. I hold that federal law governs the interpretation of federal contracts where otherwise inconsistent interpretations could be placed upon the contracts by the courts of various states composing the BPA service area. Here, the exposure of federal funds—whether held by BPA or the federal treasury—could be affected by that interpretation, and the federal program requires that conflicting state laws not create uncertainties which would impede it in raising funds in the financial markets. See also United States v. Med O Farm, Inc., 701 F.2d 88, 90 (9th Cir. 1983). This case is governed

federal law.

ALL SIGNATORIES OF THE NET BILLING AGREEMENTS HAD AUTHORITY TO ENTER INTO THOSE AGREEMENTS FOR THE CONSTRUCTION OF WPPSS PLANTS 1, 2 AND 3.

(6) The net billing agreements are contracts between the United States, acting through BPA, WPPSS and the Northwest utilities. Under these contracts, utilities buy power from BPA. Instead of paying BPA, however, utilities pay WPPSS, which uses the money to retire bonds issued for the completion of WPPSS plants 1, 2 and 3. Thus BPA "net-bills" for power and those bills are paid to WPPSS as third party beneficiary of the BPA-utility contracts and in satisfaction of WPPSS' rights under the net billing agreements. The risk of a "dry-hole" lies with BPA: if WPPSS plants 1, 2 and 3 are terminated prior to completion (or for that matter after completion) they will not produce power which BPA can sell to utilities. However, BPA will continue to market power to

utilities and utilities will continue to buy it. Utilities wil pay only for the power they use. BPA will either have to "eat" the loss in the sense that the federal government will, in one guise or another, support BPA to the extent of the deficiency, or BPA will have to raise its power rates in order to reimburse itself for excess capacity. In the latter case, the result would be an overall rise in BPA's power rates at some date in the future.

The utilities entering into these agreements thus merely entered into authorized contracts for power. If no power is provided, no power is paid for. There is no infirmity in this arrangement. It is no different from the behavior which two private citizens might enter into for the buying and selling of any commodity. If no commodity is provided there is no duty to pay; the provider of the commodity must necessarily charge a price consonant with the cost of doing business.

There is no unfunded "debt" created, requiring public entities to commit the use of their future taxing or general revenue powers. There is no principle which prevents public entities from contracting for the purchase of power and that is all that occurs under the net billing agreements. Such purchases are encouraged by applicable laws of the United States.[2] Based upon my examination of the net billing agreements, I hold that the United States bears the financial risk if the plants do not produce power. See note 1, supra.

I also find that all signatories to the net billing agreements had authority to enter into these federal contracts.[3] A declaration to this effect shall issue.[4]

FOOTNOTES

1. In City of Springfield v. WPPSS, supra, at n. 2 I noted that the impact of this litigation on the federal treasury could "potentially" be immense. I note that I am not in fact required to decide how BPA could finance its obligation to assume the "dry-hold" risk. In this case I need only decide that BPA bears this liability, and not the method of meeting it. The federal treasury is "potentially" liable, and I take this factor into consideration along with the many other federal interests in the operation of BPA's system, and find that federal law governs. A crucial consideration requiring the application of federal law is the need for uniformity. Even if Oregon appellate courts approve the net billing agreement concept, see note 2, infra, there would still be uncertainty because of potential legal challenges in other states. See Clearfield Turst, supra. Such uncertainty illustrates the need for a uniform federal

rule. See United States v. Calfiornia, supra. at 920. A ruling based upon a source of law which can adjudge the rights of all parties to the net billing agreements is required.

2. See United States Constitution, Article 1, Section 10, see also Central Lincoln People's Utility District v. Johnson, supra. It is not contended by any party that it lacks charter or statutory authority to enter into contracts for power. Cf. Martin v. Oregon Building Authority, 276 Or. 135, 142, 143 and 155, 554 P.2d 126 (1976) (Leaseback arrangement in which state was obligated unconditionally on debts held unconstitutional because would constitute a long term debt requiring use of taxing power). Nor does Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, ___ U.S. ___, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), have any application to this proceeding. The issue in PGE was

whether Congress' passage of the Atomic Energy Act precluded state regulation of nuclear wasters. If., ___ U.S. at ___, ___, S.Ct. at 1722-1729, see also Id. at n. 28. This determination obviously turned upon legislative intent and the special interests of California in economic regulation of energy. Id., ___ U.S. at ___, ___, do not apply to this case, which concerns contracts with the federal government. See Clearfield Trust, supra.

3. I emphasize the narrowness of my holding. I rule only that all signatories had authority to enter into the agreements, and make no ruling with respect to possible claims of estoppel or misrepresentation in connection with the agreements.

4. The Trojan nuclear plant was also financed through the use of net billing agreements.

CERTIFICATE OF MAILING

I hereby certify that the foregoing SUPPLEMENTAL APPENDICES was served this 30 day of December, 1985 by United States Mail, be depositing 1 copy(ies) of said Supplemental Appendices with postage prepaid thereon in the United States Post Office in Springfield, Oregon addressed to each of the following parties:

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